United States Court of Appeals

for the Second Circuit

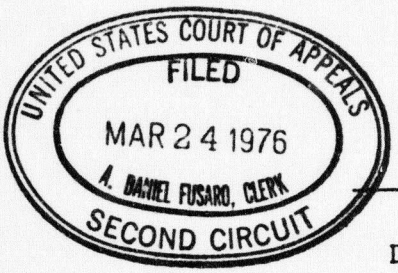
SUPPLEMENTAL BRIEF

original

76-3036

76-7115

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



Docket Nos. 76-3036 and 76-7115

B P/S

ISAAC LORA, etc., et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

- against -

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.

Defendants-Appellees.

SUPPLEMENTARY BRIEF FOR APPELLANTS ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

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TABLE OF CONTENTS

	Page
Question Presented	1
Preliminary Statement	1
Statement of the Case	2
A. The Pleadings and Class Action Motion	2
B. The Motion for Preliminary Injunction	2
Argument	9
POINT I	
APPELLANTS HAVE SHOWN PROBABLE SUCCESS ON THE MERITS OR, IN THE ALTERNATIVE, SUFFICIENTLY SERIOUS QUESTIONS GOING TO THE MERITS TO MAKE THEM A FAIR GROUND FOR LITIGATION	11
A. The transfer of children from regular schools to schools for the "socially maladjusted and emotionally disturbed," both without adequate prior notice and and an opportunity to be heard at a due process evidentiary hearing and without subsequent opportunity for periodic review of their status at a due process evidentiary hearing, violates the Due Process Clause of the Fourteenth Amendment and the federal Education of the Handicapped Act	12
B. Appellees' practice of searching the persons of SMED school students and members of of their class violates the Fourth Amendment to the United States Constitution and their right to privacy under the United States Constitution	25

Page

POINT II

APPELLANTS ARE SUBJECT TO POSSIBLE IRREPARABLE INJURY..... 32

POINT III

THE BALANCE OF HARDSHIPS TIPS DECIDEDLY TOWARD APPELLANTS..... 35

POINT IV

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION..... 37

CONCLUSION..... 41

TABLE OF AUTHORITIES

CASES CITED

	Page
Anti-Facist Committee v. McGrath, 341 U.S. 123, 163, 71 S.Ct. 624, 644 (1951).....	17
Bartley v. Kremens, 44 U.S.L.W. 2063 (E.D. Pa. 1975).....	22
Beck v. Ohio, 379 U.S. 89, 97 (1964).....	28
Board of Regents v. Roth, 404 U.S. 564, 570-71 (1972).....	14
Boddie v. Connecticut, 401 U.S. 371 378-379 (1971).....	14
Brinegar v. U.S., 338 U.S. 160, 180-182, 69 S.Ct. 1302, 1314 (1949).....	28-29
Brookins v. Bonnell, 362 F.Supp. 379 (E.D. Pa. 1973).....	34
Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954).....	18
Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1748 (1961).....	17
Canal Authority of Florida v. Callaway, 489 F.2d 567 (4th Cir. 1974).....	39
Columbia Pictures Industry, Inc. v. American Broadcasting Co., 501 F.2d 894, 897 (2d Cir. 1974)...	10,39
Escalera v. New York City Housing Authority, 425 F.2d 853 (1970).....	17

	Page
Fuentes v. Shevin, 407 U.S. 67 (1972).....	14,17,36
Gesham v. Chambers, 501 F.2d 687, 691 (2d Cir. 1974).....	10
Goldberg v. Kelley, 397 U.S. 254 (1970).....	17,33,36
Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974).....	15
Goss v. Lopez, 95 S.Ct. 729 (1975).....	12,14,15 16,22,24 33-34
Gulf & Western Industries v. Great Atlantic and Pacific Tea Company, 476 F.2d 687, 692-3 (2d Cir. 1973).....	10
Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 17 (2d Cir. 1971).....	38
In re Downey, 72 Misc.2d 772, 340 N.Y.S.2d 687 (Fam.Ct. N.Y.Co. 1973).....	13
In re Gault, 387 U.S. 1 (1967).....	23
Kidd v. Schmidt, No. 74-C-605, 9 Clearinghouse Review 730 (E.D. Wis. 1975).....	22
Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966)....	28,30
Lollis v. New York State Department of Social Services, 322 F.Supp. 473, mod., 328 F.Supp. 1119 (S.D.N.Y. 1970).....	33
Mela v. Calloway, 378 F.Supp. 25, 29 (S.D.N.Y. 1974).	10
Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.C.D.C. 1972).....	15,17,22 23
Morrisey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972)	16,17

Page

Newkirk v. Butler, 499 F.2d 1214 (2d Cir. 1974), vacated on other grounds, 419 U.S. 894 (1975)..... 15

New York Assoc. for Retarded Children, Inc. v. Rockefeller, 357 F.Supp. 752, 762 (E.D.N.Y. 1973).. 16,23,24

New York Pathological and X-Ray Laboratories, Inc. v. Immigration and Naturalization Service, 523 F.2d 79, 81 (2d Cir. 1975)..... 11

Omega Importing Corp. v. Petri-Kine Camera Company, 451 F.2d 1190, 1197 (2d Cir. 1971)..... 11,39

People v. Scott D., 34 N.Y.2d 483, 358 N.Y.S.2d 403 (1974)..... 26,30,35 36

People ex rel. Menechino v. Warden, 27 N.Y.2d 376 (1971)..... 15

Plano v. Baker, 504 F.2d 595 (2d Cir. 1974)..... 24

Pride v. Community School Board of Brooklyn, 488 F.2d 321, 324 (2d Cir. 1973)..... 10

Roberts v. Kowlton, 377 F.Supp. 1381 (S.D.N.Y. 1974).. 10

Securities and Exchange Commission v. Spectrum, Ltd., 489 F.2d 535, 540 (2d Cir. 1973)..... 38,39 (cited as Spectrum)

Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969)..... 14,17

Sonesta Int'l. Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973)..... 10,35

Stark v. New York Stock Exchange, 466 F.2d 743, 744 (2d Cir. 1972)..... 10

	Page
Terry v. Ohio, 392 U.S. 1 at 21 n.18 (1968).....	28,31
U.S. v. Brignoni-Ponce, 95 S.Ct. 2574 (1975).....	32
U.S. v. Davis, 482 F.2d 893 (9th Cir. 1973).....	31
U.S. v. Ortiz, 95 S.Ct. 2585 (1975).....	32
U.S. v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973)...	31
U.S. ex rel. Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974).....	15
Williams v. Alioto, Case No. C-74-0866 - ACW, U.S. District Court, Northern District of California, April 25, 1974.....	29-30,35
Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 276 Ed.2d 515 (1971).....	15
Wood v. Strickland, 420 U.S. 308, 326 (1975).....	13

STATUTES CITED

Constitution of the State of New York, Article II, Section 1.....	13
Education Law, Section 3202(1).....	13
Education of the Handicapped Act, 20 U.S.C. § 1401, et seq.....	19,20

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DOCKET NOS. 76-7036 and 76-7115

ISAAC LORA, etc., et al., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

-against-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

QUESTION PRESENTED

Did the district court abuse its discretion by denying Plaintiffs-Appellants' motion for a preliminary injunction?

PRELIMINARY STATEMENT

Plaintiffs-Appellants ("Appellants") appeal from an Order of the United States District Court for the Eastern District of New York (Bruchhausen, D.J.), entered on March 8, 1976. The order denied Appellants' motion for a preliminary injunction. Pursuant to the order of this Court, dated March 18, 1976, this appeal has been consolidated with Appellants' earlier appeal from the denial of their class action motion.

STATEMENT OF THE CASE

A. The Pleadings and Class Action Motion

The pleadings herein are fully discussed in Appellants' principal memorandum of law directed to the class action motion (M2-12),* to which the Court is respectfully referred.

Similarly, the proceedings below insofar as they relate to the motion for class action determination are set forth in Appellants' principal memorandum. (M12-13).

B. The Motion for Preliminary Injunction

On January 22, 1976, Appellants filed a notice of motion pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction. (SA 1) The motion, made returnable on February 9, 1976, was adjourned at Appellees**request to March 3, 1976. In it, Appellants

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*Numbers preceded by "M" refer to pages of Appellants' principal brief. Numbers preceded by "A" refer to pages of the Appendix. Numbers preceded by "SA" refer to pages of the Supplemental Appendix.

**Although the State defendants submitted an Answer (A105), they have not participated in the lower court motions or discovery to date. Unless otherwise indicated, references to "Appellees" will refer only to City Defendants.

sought an order of the Court:

(1) preliminarily enjoining all defendants from continuing the placement of Appellants in "Special Day Schools for the Socially Maladjusted and Emotionally Disturbed" unless within 10 days from the date of said order defendants provide the Appellants with the following:

A. Written notice of the opportunity to challenge at a due process evidentiary hearing their placement in "Special Day Schools for the Socially Maladjusted and Emotionally Disturbed." Such notice shall inform students of the reasons for their placement, their right to counsel at said hearings and their right to prior review of any and all records upon which their placement is based in defendants' possession;

B. A due process evidentiary hearing, with the right to counsel, the right to confront witnesses and the right to present evidence on behalf of the alleged "socially maladjusted and emotionally disturbed" child;

C. Written findings upon which any decision to continue the placement of a child in "Special Day Day Schools for the Socially Maldjusted and Emotionally Disturbed" is based;

(2) preliminarily requiring defendants to return to suitable classes in the regular public school system any Appellant who, either because of the aforementioned hearing or for any other reason, is discharged from "Special Day Schools for the Socially Maladjusted and Emotionally Disturbed";

(3) preliminarily enjoining defendants from searching the person of Appellants without probable cause and from requiring Appellants to remove all their belongings and to place them with school officials each morning as a pre-condition to attending classes;

(4) and for such other and further relief as to the Court may seem just and proper.

The procedures pursuant to which children are placed in "Special Day Schools for the Socially Maladjusted and Emotionally Disturbed" are detailed at some length in the discussion of the pleadings in Appellants' principal memorandum. (M6-10).*

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*Briefly, up until December 1, 1975, Special Circular No. 47 governed the process of evaluation and placement in SMED schools. Special Circular No. 47 was then superceded by Special Circular No. 35, 1975-1976.

Affidavits from Appellants and their parents which were submitted in support of Appellants' motion demonstrate that children are in placement in SMED schools without having received appropriate due process safeguards. Although Special Circular No. 47, which sets forth the procedures by which Appellants were placed in SMED schools, stated that "[a] letter of parental consent should accompany the referral," such consent was most often given as a result of misinformation and coercion. See Affidavits of Carmen Lora, Rita Walters, Melba Martin, Mulvinina White and Thelma Moore annexed to the supporting affidavit of Gene B. Mechanic (SA 14,30,19,26,34).

These parental affidavits state that the parents were neither aware that the referring school was obligated to use less restrictive means to help their children before SMED school placement, nor that they could object to their children's segregation. Moreover, although Special Circular No. 47 suggested Bureau of Child Guidance ("BCG") evaluations prior to SMED school referral, BCG was not consulted under the procedure. Rather, the children were characterized as "socially maladjusted and emotionally disturbed" without a

clinical evaluation. See Deposition of Vera Paster, October 6, 1975, page 54.

Appellants attached affidavits to their motion stating that they were never asked to consent to SMED placement and, in fact, have objected to their segregation. See Affidavits of Isaac Lora, Kelvin Walters, Francisco Lugo, Ranjeet Martin, Lawrence White and Jerome Moore annexed to the supporting Affidavit of Gene B. Mechanic (SA 12,16,22,24,28,32). Yet Appellees failed to inform them of their due process rights and provide them with a due process opportunity to be heard. (SA 8-9).

In addition, the parents of Appellants have stated in their affidavits that not only was their consent coerced, but school officials paid no attention to their subsequent attempts to remove their children from SMED schools. In fact, one week after Appellant Walter's mother was forced to consent to SMED school placement for Kelvin, she wrote a letter to the guidance counselor of the SMED school describing her dismay at her son's treatment by the Board of Education and her unwillingness to have him attend the SMED school. See Exhibit "C" to the supporting Affidavit of Gene B. Mechanic. (SA 39). Even though

Kelvin had not even begun to attend the school, the letter was ignored. With no other alternative, Mrs. Walters was compelled to send her son to the school. (SA 9).

The criteria for SMED school referral under the new Special Circular No. 35 are like those of the superceded circular, except that truancy is no longer an enumerated consideration. As with the superceded circular, Special Circular No. 35 contains no provisions concerning due process safeguards before a student is placed into a SMED school. Special Circular No. 35 like the one it superceded, contains no mandate that the child's consent be obtained. It also contains no provisions to assure that parental consent is given voluntarily and informedly, with other alternatives and the child's rights discussed. (SA 10).

The new circular requires BCG clinical evaluations before referral to SMED schools. However, the only provision which may eventually affect those placed under old procedures, who comprise the vast majority of the present SMED school population, concerns the condition that students are to receive a semi-annual reevaluation and a reexamination once every three years. See section 3.8 of the new circular, which is annexed to Appellants principal brief. No procedures are mentioned

by which a child or his parent may challenge Appellees' actions resulting from the reevaluation. (SA 10). Moreover, Vera Paster, the Assistant Director of BCG, stated in a deposition taken on October 14, 1975, that parents are not permitted to read psychological or psychiatric BCG evaluations on their child. Deposition of Vera Paster, October 14, 1975, p. 145-46. (SA 10).

Affidavits from Appellants submitted in support of their motion further demonstrate that Appellees have perpetuated a policy of indiscriminately searching the persons of children as they enter various SMED school buildings or classrooms. Defendant Jud Axelbank, principal of an SMED high school, stated during his deposition on November 19, 1975, that as boys enter the school each morning they must place all their "contraband" in a bag which is kept by school officials until the end of the school day. Defendant Axelbank stated that boys who refuse to empty their pockets and be subjected to searches of their persons are not permitted to attend schools (Deposition of Jud Axelbank, Nov.19,1976, pp. 50-51).

On March 3, 1976, Judge Bruchhausen heard oral argument on the motion for a preliminary injunction. Shortly thereafter, on March 8, 1976, the order denying that motion was entered. (SA 66).

Restricting all counsel to brief statements at oral argument and without conducting any evidentiary hearing, the Court ruled:

> In the case at bar, the movants have failed to establish that they are entitled to this drastic relief now sought. On the contrary, the granting of this relief would cause chaos and irreparable harm throughout the entire educational system by requiring full adversary hearings, and would irreparably damage the functioning of the special educational program for the handicapped children.

On March 10, 1976, Appellants filed their Notice of Appeal from that Order, (SA 70) and on the following day, moved this Court for an order consolidating the appeals from the orders of the District Court entered on January 6, 1976, and March 8, 1976, permitting Appellants to proceed with such consolidation without payment of an additional filing fee and granting appellants leave to file a supplementary record on appeal, supplementary appendix and supplementary brief in support of their appeal. That motion was granted on March 18, 1976.

ARGUMENT

Ignoring basic constitutional principles, the District Court's order denying Appellants motion for a preliminary

injunction was clearly an abuse of discretion. The district court failed to recognize the inherent injury involved both in a youth's classification as "socially maladjusted and emotionally disturbed" and in segregation in SMED schools wherein random searches of students' persons are regularly performed. Moreover, without holding an evidentiary hearing, the lower court supported its decision on findings of fact which were in dispute.

A preliminary injunction should issue only on a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting preliminary relief. Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973). Accord: Columbia Pictures Industry, Inc. v. American Broadcasting Co., 501 F. 2d 894, 897 (2d Cir. 1974); Mela v. Calloway, 378 F. Supp. 25, 29 (S.D.N.Y. 1974); Roberts v. Knowlton, 377 F. Supp. 1381 (S.D.N.Y. 1974). See: Gulf and Western Industries v. Great Atlantic and Pacific Tea Company, 476 F. 2d 687, 692-3 (2d Cir. 1973); Pride v. Community School Board of Brooklyn, 488 F. 2d 321, 324 (2d Cir. 1973); Stark v. New York Stock Exchange, 466 F. 2d 743, 744 (2d Cir. 1972); Gesham v. Chambers, 501 F. 2d

687, 691 (2d Cir. 1974).

Whether a preliminary injunction should be granted is within the discretion of the trial court and reversal of the lower court's decision requires a showing of abuse of discretion. New York Pathological and X-Ray Laboritories, Inc. v. Immigration and Naturalization Service, 523 F. 2d 79, 81 (2d Cir. 1975). However, as stated by Judge Friendly in Omega Importing Corp. v. Petri - Kine Camera Company, 451 F. 2d 1190, 1197 (2d Cir. 1971):

> "..... we recognize the frequent statements that the discretion of a district judge in refusing or granting a temporary injunction will generally be respected .... But Congress would scarcely have made orders granting or refusing temporary injunctions an exception to the general requirement of finality as a condition to appealibility, 28 U.S.C. §1292 (a)(i), if it intended appellate courts to be mere rubberstamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason."

In the instant case, the District Court, at best, abused its discretion.

POINT I

APPELLANTS HAVE SHOWN PROBABLE SUCCESS ON THE MERITS OR, IN THE ALTERNATIVE, SUFFICIENTLY SERIOUS QUESTIONS GOING TO THE MERITS TO MAKE THEM A FAIR GROUND FOR LITIGATION.

A. The transfer of children from regular schools to schools for the "socially maladjusted and emotionally disturbed", both without adequate prior notice and an opportunity to be heard at a due process evidentiary hearing and without subsequent opportunity for periodic review of their status at a due process evidentiary hearing, violates the Due Process Clause of the Fourteenth Amendment and the federal Education of the Handicapped Act.

Children who are entitled under state law to a free education have an "interest" which is protected by the Due Process Clause of the Fourteenth Amendment. Goss v. Lopez, 95 S. Ct. 729 (1975). In Goss, at 735, the Supreme Court said that:

> ...urteenth Amendment forbids the State to deprive any person of life, liberty or property without due process of law. Protected interests in property are normally "not created by the Constitution. Rather, they are created and their dimensions are defined" by an independent source such as state statutes or rules entitling the citizen to certain benefits. Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed.2d 548 (1972)....

The Court then held at 736 that:

> [A]mong other things, the State is constrained to recognize the student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause.

The Court found that an Ohio student who had been suspended from school for ten days had a constitutional right to receive

due process safeguards, as a general rule, preceding removal from school, or, in some cases, as soon as practicable following removal.

In Wood v. Strickland, 420 U.S. 308, 326 (1975), the Supreme Court reiterated that students cannot be suspended without procedural due process, emphasing that "[p]ublic high school students do have substantive and procedural rights while at school." The Court then held that school officials are not immune from liability for damages under §1983.

The rights of each child in New York State to a free education are set forth in Article 11 § 1 of the Constitution of the State of New York, which states:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.

"The burden is therefore on the State [under Article 11 § 1] to assure that the educational program provided each child is appropriate to his needs..." In Re Downey, 72 Misc. 2d 772, 340 N.Y.S.2d 687 (Fam. Ct. N.Y. Co. 1973).

Furthermore, under § 3202(1) of the Education Law "[a] person over five and under twenty-one years of age who has not received a high school diploma is entitled to attend the pupil schools maintained in the district in which such person resides

without the payment of tuition."

Hence, education is an interest for which the children in New York State are protected by the due process clause.

A child need not be totally excluded from the public school system for due process to come into play. In determining "whether due process requirements apply in the first place, we must look not at the "weight" but to the nature of the interest at stake." Board of Regents v. Roth, 404 U.S. 564, 570-71 (1972). Fuentes v. Shevin, 407 U.S. 67 (1972). The property deprivation in the instant case goes to the exclusion of children from the regular public school system and subsequent segregation into a system for the "socially maladjusted and emotionally disturbed."

As long as a property deprivation is not de minimis, its gravity is irrelevant to the question of whether account must be taken of the due process clause. Sniadach v. Family Finance Corp., 395 U.S. 337, 342 (1969); Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971); Board of Regents v. Roth, supra, at 570 n.8. Certainly if the Supreme Court has held that a ten day suspension from school is not a de minimus property deprivation, Goss, supra, at 737, the potentially permanent removal of the students from the regular school system and placement into

a segregated system for the "socially maladjusted and emotionally disturbed" constitutes more than a de minimus property deprivation.

Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.C.D.C. 1972) supports plaintiffs' claim. In Mills at 875, the court held that the Due Process Clause applies to the reassignment of children from regular classes to classes for the emotionally disturbed, mentally retarded or brain injured.*

The Due Process Clause also forbids arbitrary deprivations of liberty. In Goss v. Lopez, supra, at 736, the Court said:

> "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him," the minimal requirements of the clause must be satisfied. Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 s.Ct. 507, 510, 276. Ed.2d 515 (1971)....

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* Even when a prisioner is transferred for non-administrative reasons to another institution, which would include attempts to reform behavior, the federal courts have recognized that due process requires notice and an opportunity to be heard, U.S. ex. rel. Haymes v. Montanye, 505 F. 2d 977 (2d Cir. 1974); Newkirk v. Butler, 499 F.2d 1214 (2d Cir. 1974), vacated on other grounds, 419 U.S. 894 (1975). Gomes v. Travisono, 510 F. 2d 537 (1st Cir. 1974). See also People ex. rel. Menechino v. Warden, 27 N.Y. 2d 376(1971) [parolee has constitutional right to assistance of counsel at a due process hearing before parole revocation].

Special day school placement undoubtedly stigmatizes a student. Along with the acknowledged labeling of the child as "socially maladjusted and emotionally disturbed," other less obvious judgements of the child's reputation are also made. Students have been transferred to special day schools for allegedly committing acts of truancy, juvenile delinquency and upon other charges of misconduct. As the Court stated in Goss, supra at 736:

> It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.

A student at a special day school suffers great harm to his reputation and is severely stigmatized not only during his attendance at that school but in all future years. The characterization of a person as "socially maladjusted and emotionally disturbed" involves a public stigma and that determination must therefore be made in accordance with due process protection. N.Y. Assoc. for Retarded Children Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973).

"Once it is determined that due process applies, the question remains what process is due." Morrisey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593(1972). However, as emphasized in

Goss, at 738:

> "The fundamental requisite of due process of law is the opportunity to be heard," Grannis v. Ordean, 234 U.S. 385, 394, 34 S. Ct. 779, 783, 58 L.Ed. 1363 (1914), a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." Mullane v. Central Hanover Trust Co., supra, 339 U.S. at 314, 70 S. Ct. at 657.

Similarly, the court in Mills v. Board of Education of the District of Columbia, supra at 875, concluded that due process of law requires both a hearing prior to classification into a special school program and periodic review thereafter.*

The timing and content of the notice and the nature of the hearing are to be determined by balancing the competing interests involved. Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1748 (1961); Anti-Facist Committee v. McGrath, 341 U.S. 123, 163, 71 S. Ct. 624, 644 (1951); Morrisey v. Brewer, supra, 408 U.S. at 481, 92 S.Ct. at 2600.

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* Due process has also required notice and hearing, to name a few more examples, prior to termination of welfare benefits [Goldberg v. Kelley, 397 U.S. 254 (1970)]; before eviction from public housing [Escalera v. New York City Housing Authority, 425 F.2d 853 (1970); prior to garnishment of wages [Sniadach v. Family Finance Corp., supra] and before pre-judgment replevin [Fuentes v. Shevin, supra].

"Education is perhaps the most important function of state and local governments." Brown v. Board of Education, 347 U.S. 483, 493, 74 S.Ct. 686, 691 (1954). Plaintiffs submit that this case presents circumstances where due process requires written notice specifying the reasons and basis for the governmental action, including decisions regarding the evaluation, classification and placement of plaintiffs. Due process also requires that plaintiffs be given the opportunity to challenge as soon as possible their evaluation, classification and placement as "socially maladjusted and emotionally disturbed" children at an evidentiary hearing, with counsel present and minutes taken. They should be given the right to confront witnesses and present evidence. Plaintiffs should further be notified of such due process rights in writing. Any findings, and the basis therefore, must also be in writing.

The governmental interest in assuring that each child receives a suitable education will in no way be stifled as a result of the implementation of due process procedures. In fact, holding school officials accountable for their actions concerning plaintiffs will better assure that such actions are legitimate and, therefore, that the governmental interest in providing suitable education is being fulfilled.

Furthermore, the operation of the school system will only be slightly affected. Defendant Board of Education already has persons and resources devoted to school suspension hearings. These hearings include the right to counsel, confrontation and introduction of evidence. Moreover, minutes are taken. See Chancellor's Special Circular No. 103, 1969-1970. Decisions concerning the potential permanent exclusion of an allegedly emotionally handicapped person from the regular school system should not involve less due process than decisions concerning temporary suspension from school.

The Education of the Handicapped Act, 20 U.S.C. § 1401, et seq., also mandates that plaintiffs receive notice and a due process opportunity to be heard before SMED placement. Under § 1413(b), any state which receives grants under the Act shall

> (13) provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (a)(i) prior notice to parents or guardians of the child when the local or State educational agency proposes to change the educational placement of the child, (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing, examine all relevant records with respect to the classification

> or educational placement of the child, and obtain an independent educational evaluation of the child, (iii) procedures to protect the rights of the child when the parents or guardians are not known, unavailable, or the child is a ward of the State including the assignment of an individual (not to be an employee of the State or local educational agency involved in the education or care of children) to act as a surrogate for the parents or guardians, and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal; and (B) procedures to insure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and (C) procedures to insure the testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory.

The Board of Education receives money, through New York State, under the Education of the Handicapped Act from the federal government. By failing to provide due process procedures in the SMED placement process, defendants are unequivocably violating 20 U.S.C. § 1413(13).

The affidavits from Appellants and their parents submitted to the lower court (SA 12-35) demonstrate that youths who are now in involuntary SMED school placement pursuant to Special Circular No. 47, have been denied procedural due process and are entitled to immediate relief. In addition, those children who have been or will be placed into SMED schools under the new Special Circular No. 35, have an equally substantial due process claim.

Provision of a due process evidentiary hearing has never been and continues not to be a mandated part of the SMED school placement process, as Appellants admit (A68,73-4,77,82,85-6). Furthermore, although Special Circular No. 47, suggested and Special Circular No. 35 §3.5 requires that parental consent be obtained before SMED school referral, no assurances exist that such consent be voluntary and informed.

These assurances are essential. The parents of Appellants stated in their lower court affidavits that their consent to their children's SMED school placement was not given voluntarily or informedly (SA14,19,26,30,34). They were told that the SMED school program was the only available alternative. Parents were threatened with the suspension of their children from all schools unless they consented (SA 19). Moreover,

parents were not adequately informed about the substance or expectations of the SMED school program.

Furthermore, school officials seemingly take the position that a parent cannot withdraw consent once a child is deemed transferred to an SMED school. See Affidavit of Rita Walters and Exhibit "C" annexed to lower court notice of motion (SA 14,39); Deposition of Jud Axelbank, dated November 19, 1975 (pp. 65-68).

Most importantly, the consent of the persons most affected, the SMED school students, was not obtained under the superceded referral procedures or is it obtained under the new procedures. See Special Circulars No. 47 and 35 annexed to Principal Brief. Even assuming, arguendo, that a parent knowingly and informedly wishes to have a youth placed into a SMED school, the student has an independent right to protest such deprivation at a due process evidentiary hearing and to be notified of such right. Goss v. Lopez, supra; Mills v Board of Education, supra; See also Kidd v. Schmidt No. 74-C-605, 9 Clearinghouse Rev. 730 (E.D. Wis. 1975); Bartley v. Kremens, 44 U.S.L.W. 2063 (E.D. Pa. 1975); [Parent cannot voluntarily place a child in mental health facility without providing child with due process evidentiary hearing]. "Neither the Fourteenth Amendment nor

the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1 (1967). The fact that there are no provisions for obtaining the consent of students is consistent with appellees' stated lack of respect for the opinions of the young people they teach (Affidavit of Joseph F. Bruno in opposition to preliminary injunction, ¶44; SA. 56).

That "a clinical team" must now diagnose a child for SMED school placement under the new procedures (Special Circular No. 35 §1) has no bearing on the need of those students placed under the old procedures for immediate relief. However, clinical certification cannot in any way obviate the need for due process safeguards, including an evidentiary hearing, prior to SMED school placement. Mills v. Board of Education supra; New York Association of Retarded Children v. Rockefeller, supra. See also Education of the Handicapped Act, 20 U.S.C. § 1413(13).*

Furthermore, Vera Paster, the assistant director of BCG stated in a deposition taken on October 14, 1975 (pp. 145-6), that neither parents nor students are permitted to read the psychological or psychiatric BCG evaluations based upon which placements are made. Clearly, this policy conflicts with basic due process prinicples under the Fourteenth

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* Most of the youths now placed in SMED schools including the named Appellants have not been clinically diagnosed. Footnote continued.....

Amendment, as well as the mandate of 20 U.S.C. § 1413 (13) (A)(2) and (C); and the new circular does not change this policy.

Appellees suggested to the lower court that sufficient opportunity to challenge SMED school placement exists through present administrative appeal procedures which include "conferences" with special education personnel, and "appeals" to the committee on the Handicapped in the community school district, to the Executive Director of the Division of Special Education, and to the State Commissioner of Education (SA 46). Appellants submit that such procedures are insufficient because they provide review long after the placement has occured. Goss v. Lopez, supra. Most importantly, they fail to provide an expeditious evidentiary hearing which conforms with due process standards.

In Plano v. Baker, 504 F. 2d 595 (2d Cir. 1974), the Second Circuit rejected a school district's argument that the plaintiffs be required to present their claims to the Commissioner of Education. Judge Smith said:

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* Footnote continued.....

They were placed prior to implementation of the new procedures, and Appellees have not yet evaluated them under the reevaluation provisions of section 3.8 of Special circular No. 35 (See i.e. Deposition of Vera Paster, dated October 6, 1975 pp. 120-121) Evidently, Defendants cannot even assure compliance with their own procedures. (Paster Deposition p. 56). Moreover, the new circular mentions no procedures by which a child or parent may challenge the reevaluations, should they ever take place.

> Nowhere in the administrative process which the district court required appellant to exhaust was there a procedure designed to resolve factual issues. The Board did not conduct a fact-finding hearing, and the regulations governing appeals to the Commissioner, 8 N.Y. Code of Rules and Regulations §276.2, make oral argument discretionary and expressly prohibit the taking of testimony:
>
> (b) The commissioner may, in his sole discretion, determine whether oral argument shall be had.
>
> (d) All evidentiary material shall be presented by affidavit or by exhibits. No testimony is taken and no transcript of oral argument will be made.
>
> Where a dispute is largely factual, we fail to see how an administrative remedy that expressly forbids the examination and cross-examination of witnesses can be considered adequate for purposes of the exhaustion rule.

Likewise, the Defendants' suggested appellate procedures cannot be considered to meet standards of due process notice and an opportunity to be heard.

B. Appellees' practice of searching the persons of SMED school students and members of their class violates the Fourth Amendment to the United States Constitution and their right to privacy under the United States Constitution.

The Complaint herein challenges SMED school administrators' and personnel's practice of conducting searches of the persons of children who attend SMED schools. At least one of the defendant SMED school principals has already conceded

that, in order to enter his school, each student must remove all of his belongings from his person and place them in a bag which is held by a school employee for the duration of the school day.* In addition, all of the named Appellants have been forced to undergo daily personal searches during the course of their attendance at SMED schools. See affidavits of named Plaintiffs attached to lower court moving papers (SA 12,16,22,28,32).

Clearly the practice of indiscriminately searching students without their consent and without probable cause or even reasonable suspicion violates their right under the Fourth Amendment to the United States Constitution.

In People v. Scott D., 34 N.Y. 2d 483, 358 N.Y.S. 2d 403 (1974), the Court of Appeals of the State of New York specifically held that students are protected by the Fourth Amendment from unreasonable searches and seizures, and invalidated the seizure of narcotics from a student's wallet during a body search in the principal's office. Recognizing that teachers act both as agents of the State as well as in loco

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* Jud Axelbank, Principal of P-91M, in Manhattan, Deposition of November 19, 1975; pp. 50-51.

parentis, the Court stated that teachers do not possess all the parental prerogatives. The Court noted that school authorities may have special responsibilities which require that they protect the safety of their students. However, the Court stated:

> That the primary purpose of school searches may be to protect the school environment and not to secure a criminal conviction...does not permit random causeless searches. Thus, the ban against unreasonable searches and seizures is applicable in situations involving "administrative" action as well as criminal proceedings. [Citations omitted.] It is anomalous to regard the freedom from unreasonable searches as protected only when a person is subjected to criminal sanctions or procedure. [Citation omitted.]
>
> 358 N.Y.S. 2d at 407.

In balancing the interests of school authorities with the rights of students the Court concluded that the power to search must be strictly limited to only those instances where formulations of a reasonable suspicion, based upon specific and concrete factors, including observation over a period of time, preceded the search.

Many courts have dealt with the Fourth Amendment requirement of particularity and specificity in the information upon which a search is predicated. The ostensible need for protecting the school environment cannot overcome this requirement. Cases dealing with police "stop-and-frisk" procedures make it clear

that the "demand for specificity in the information upon which police [or state] action is predicated is the central teaching of [the Supreme]...court's Fourth Amendment jurisprudence." Terry v. Ohio, 392 U.S. 1, at 21 n.18 (1968). If Courts relax the demand for specificity, and permit random, causeless searches, "the protections of the Fourth Amendment would evaporate, and the people would be secure in their persons, houses, papers, and effects' only in the discretion of the police." Beck v. Ohio, 379 U.S. 89, 97 (1964). Stops and searches based upon criteria that do not focus upon the particular individual subject have been condemned by many courts.

In Lankford v. Gelston, 364 F. 2d 197 (4th Cir. 1966), plaintiffs sought injunctive relief against mass dragnet searches of Black neighborhoods by police, who were acting on the basis of uncorroborated anonymous tips. The fact that many of the searches did not result in arrest did not in any way mitigate the constitutional violation, and prompted the court to quote from the dissenting opinion of Mr. Justice Jackson in Brinegar v. U.S., 338 U.S. 160, 180-182, 69 S.Ct. 1302, 1314 (1949):

> There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.
> * * * * *
> There is no opportunity for injunction or appeal to disinterested intervention. The citizen's choice is quietly to submit to whatever the officers undertake or to resist at risk of arrest or immediate violence.

The Fourth Circuit further took note of the racially discriminatory and oppressive nature of searches conducted in minority neighborhoods:

> The invasions so graphically depicted in this case "could" happen in prosperous suburban neighborhoods, but the innocent victims know only that wholesale raids do not happen elsewhere and did happen to them. Understandably they feel that such illegal treatment is reserved for those elements who the police believe cannot or will not challenge them. It is of the highest importance to community morale that the courts shall give firm and effective reassurance, especially to those who feel that they have been harrassed by reason of their color or their poverty.
>
> 364 F.2d at 204.

In Williams v. Alioto, case No. C-74-0866-ACW, U.S. District Court, Northern District of California, April 25,

1974, the court preliminarily enjoined the San Francisco Police Department from continuing the forcible stopping and interrogation of Black male citizens who resembled a general profile sketch of the man alleged to have committed the notorious Zebra murders. The Court found these stops and searches of Black citizens on the sole basis of their resemblance to the Zebra profile and without further reasonable suspicion was in direct violation of the Fourth Amendment prohibition.

Like the plaintiffs in Lankford and Williams Appellants are members of minority racial groups, who have been further singled out and pushed from the mainstream public school system into the SMED schools. Thus it is their status as SMED pupils which ostensibly forms the sole basis for the complained of searches. The continuation of the large scale indiscriminate search procedures in the SMED schools will, of necessity, have a tremendously damaging impact upon these children. This was highlighted by the New York State Court of Appeals in People v. Scott D., supra, when it stated that "the psychological damage that would be risked on sensitive children by random search insufficiently justified by the necessities is not tolerable." 358 N.Y.S. 2d at 410.

Mass searches have also been criticized in the context of challenges to airport security searches. Like the searches of students in SMED schools, airport searches are conducted in order to prevent various types of "contraband" from being carried onto a particular area, in those cases, the airplane. However, the Second Circuit Court of Appeals has found that the prospect of danger alone is not sufficient to justify random search of the persons of boarding passengers. In U.S. v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973), the suspect met the "hijacker profile" used by airport security, and produced marginally confusing identification. However, this was held to constitute insufficient justification for a search and was found by the court to have violated the Fourth Amendment's requirement of particularity as set forth in Terry v. Ohio, supra. In another airport search case, U.S. v. Davis, 482 F.2d 893 (9th Cir. 1973), the Court found a Fourth Amendment violation, stating:

> To justify a stop and frisk, the government must focus on each person and demonstrate that as to that individual there is specific cause to fear the justifying harm.
> * * * * *
> ...Terry does not justify the wholesale "frisking" of the general public in order to locate weapons and prevent future crimes.
>
> At 907-908.

Also analogous are investigatory searches conducted by border police. In U.S. v. Brignoni-Ponce, 95 S.Ct. 2574 (1975), defendant's car was stopped by the roving border patrol, solely because its occupants appeared to be Mexican. Holding that such random stopping is impermissible, the Supreme Court Stated:

> Officers on a roving patrol may stop vehicles only if they are aware of specific articulable facts together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country.

See also U.S. v. Ortiz, 95 S.Ct. 2585 (1975).

Thus it is clear that the practice of indiscriminately searching the persons of SMED school students, or requiring such students to check their possessions prior to entering school is in flagrant violation of the Fourth Amendment to the United States Constitution prohibition against unlawful searches and seizures, and of the constitutionally guaranteed right to privacy and must be immediately enjoined.

POINT II

APPELLANTS ARE SUBJECT TO POSSIBLE IRREPARABLE INJURY.

Assuming the Court finds that plaintiffs have shown probable success on the merits, it need only determine that

they are subject to possible irreparable injury for a preliminary injunction to issue. Irreparable injury means, "[i]mminence of harm, or, put another way, irreparability of damage." Lollis v. New York State Department of Social Services, 322 F. Supp. 473, mod. 328 F. Supp. 1119 (S.D.N.Y. 1970).

Clearly, possible irreparable injury can result from the failure of Appellants to comply with due process before segregating children into schools for the "socially maladjusted and emotionally disturbed."

In Goldberg v. Kelly, supra, the Supreme Court found irreparable injury in termination of welfare benefits without a prior hearing. The Court stated supra, 397 U.S. at 266 90 S.Ct. at 1019 that "the stakes are too high" and "the possibility for honest error or irritable misjudgment too great" to allow governmental action without due process guarantees. Similarly, the impact of the governmental action upon the affected individuals in the instant case is enormous.

In Goss v. Lopez, supra, at 737, the Supreme Court explicitly described the significance of governmental decisions involving the education of children.

> A short suspension is of course a far milder deprivation that expulsion. But, "education is perhaps the most important function of state and local governments." Brown v. Board of Education 347 U.S. 483, 493, 74 S.Ct. 636, 691, 98 L.Ed. 873 (1954), and the total exclusion from the educational process for more than a trivial period and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child.*

The exclusion of a child from the regular school system and his characterization as "socially maladjusted and emotionally disturbed" is surely a more serious event in his life than a ten day suspension. The likelihood that he will be permanently stigmatized and that this label will follow him throughout the rest of his life is great. See New York Association of Retarded Children v. Rockefeller, supra.

Due process mandates that the child not be arbitrarily removed from regular schools and characterized as "socially maladjusted and emotionally disturbed." The possibility that defendants acted erroneously in placing plaintiffs and members of their class into SMED schools is too great to deny immediate relief requiring due process review of their status.

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* In Brookins v. Bonnell, 362 F. Supp. 379, (E.D. Pa. 1973), the District Court issued a preliminary injunction ordering a city college to reinstate an expelled student unless she was offered a due process hearing within ten days of the court's order.

Similarly, the possibility of irreparable injury from the continuation of personal searches of SMED school students is very real, and warrants the granting of preliminary relief. See p. 24, supra, and Williams v. Alioto, supra. The risk of psychological damage is great. See People v. Scott D., supra.

POINT III

THE BALANCE OF HARDSHIPS TIPS DECIDEDLY TOWARD APPELLANTS

Should a court only determine that the plaintiffs have raised sufficiently serious questions going to the merits to make them a fair ground for litigation, rather than having shown probable success on the merits, it may still award preliminary relief, if it also finds that the balance of hardships tips decidedly toward plaintiffs. Sonesta Int'l. Hotels Corp. v. Wellington, supra. In this case at bar, preliminary relief is warranted since Appellants will clearly suffer hardship to a much greater extent than Appellees.

Appellants are suffering from exclusion from regular public schools and stigmatization as "socially maladjusted and emotionally disturbed" children. Their continued segregation in this racially and sexually isolated environment without due process scrutiny of its necessity and propriety

is perpetuating an incalculable hardship on them.

On the other hand, even when considering the entire class of SMED school children, requiring Appellees to provide the children who object to their continued placement with a due process evidentiary hearing concerning their placement or restore them to regular schools is not a great hardship for Appellees or much of an inconvenience. See Point I(A). Since the time when procedural due process rights were first asserted, public authorities have unsuccessfully sought to thwart those rights by complaining of undue burden. Yet, even when such rights would attach to millions of persons, the Due Process Clause has not been defeated. E.g., Goldberg v. Kelly, supra; Fuentes v. Shevin, supra.

Similarly, the balance of hardships falls most heavily on Appellants as long as indiscriminate search practices of SMED pupils continue. People v. Scott D., supra. Thus, immediate relief is necessary to alleviate the great potential damage to these children by their continued subjection to acts which violate their clear constitutional rights.

POINT IV

THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR A PRELIMINARY INJUNCTION

Based upon the papers submitted to the court below, Appellants were entitled to immediate relief on their procedural due process and unreasonable search and seizure claims.

Unrebutted affidavits from Appellant children and their parents showed that Appellants were segregated into SMED schools without due process safeguards (p. 21-25, ante) and that once in the SMED schools they were randomly searched (p. 25-26, ante). Testimony taken from defendants in depositions as well as admissions made in the City's Answer further supported the legimacy of Appellants two claims.*

Not mentioning these facts, Judge Bruchhausen summarily concluded that the requested relief,

> "... would cause chaos and irreparable harm throughout the entire educational system by requiring full adversary hearings, and would irreparably damage the functioning of the special educational program for the handicapped children ..." (p. 3 of opinion; SA 68).

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* Judge Bruchhausen issued his order without even glancing at the depositions since they had not yet been filed in Court. Appellants' counsel was waiting to have the depositions signed by the persons deposed and returned to them.

Upon what evidence Judge Bruchhausen found that due process evidentiary hearings "would cause chaos and irreparable harm throughout the entire educational system" escapes Appellants. Appellants must assume that the lower court agreed with the statements by Appellees' counsel that Appellants were protected because parental consent has always been obtained prior to SMED placement (SA 44), that due process hearings would detriment clinical relationships and would be a burden to the City (SA 50,54,55), and that termination of certain search practices would present a danger to those within the schools. (See Memorandum of Law in Opposition to Preliminary Injunction 38-39.) This reasoning, however, is unpersuasive when balanced against the clear constitutional rights involved. In any event, it raises factual issues which could only have been resolved through an evidentiary hearing. See Securities and Exchange Commission v. Spectrum, Ltd., 489 F.2d 535,540 (2d Cir. 1973); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 17 (2d Cir. 1971).*

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* For example, affidavits from Appellants' parents stated that their consent to SMED school placement was given as a result of coercion and misinformation, and was later withdrawn (SA 14, 19,26,30,34). Also, whether the effect of a preliminary injunction on the school system would be negative or positive was a matter of conjecture. In fact, Appellants submit that due process safeguards prior to SMED classification could only better assure suitable educational services, as will termination of random search practices.
Footnote continued.....

As indicated by its opinion, the lower court did not give full and adequate consideration to all the relevant factors for a proper determination. Compare: Columbia Pictures Industry, Inc. v. American Broadcasting Company, Inc., 501 F.2d supra. at 898.

First, it placed unwarranted emphasis on maintainence of the Status quo (p. 2 of opinion; SA 67). Not only may a preliminary injunction be granted when the Status quo constitutes irreparable injury, Canal Authority of Florida v. Callaway, 489 F.2d 567 (4th Cir. 1974), but in Omega Importing Corp. v. Petri - Kine Camera Company, 451 F.2d supra. at 1197, Judge Friendly emphasized that:

> "... the principles that the general purpose of a preliminary injunction is to preserve the Status quo pending final determination of the action... and that the showing required in such a case is less strong than when the injunction would require costly changes in existing operations... are less useful in deciding concrete cases than is sometimes thought; often they merely rationalize conclusions already reached."

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* Footnote continued.....

Judge Bruchhausen failed to hold an evidentiary hearing even-though he made no finding that no material issues of fact were in dispute. Of course, this Court need give no special deference to a district court's holding concerning material issues of fact when no hearing has taken place since it is in "as good a position as [the lower court] to read and interpret the pleadings, affidavits and depositions." Spectrum, Ltd, 489 F.2d supra. at 540.

Second, the District Court made no findings as to the harm which may result to children who are segregated into schools for the "socially maladjusted and emotionally disturbed", without due process safeguards and then randomly searched in said schools. Appellants contend that these children can suffer severe damage (pp. 32 to 35 , ante.).

Third, the lower court not only rejected Appellants' procedural due process and search and seizure claims on the merits based upon its conclusory factual opinions, but its order indicates that, without any testimony taken or evidence introduced at a hearing or trial, it already believes that the SMED school system is an appropriately functioning program.

> "... the granting of this relief ... would irreparably damage the functioning of the special educational program for the handicapped children ..." (SA 68).

Since, the Complaint contains allegations, which were not raised in the motion for a preliminary injunction, that the SMED school system is not used as an appropriate educational alternative, but rather perpetuates racial and sexual segregation without providing suitable education, Appellants are most disturbed at the lower court's premature conclusion. That Judge Bruchhausen relied on his opinion as to the merits of Appellants SMED school placement, without having heard any

testimony in this proceeding, certainly indicates an abuse of discretion.

CONCLUSION

THE ORDER OF THE LOWER COURT DENYING APPELLANTS MOTION FOR A PRELIMINARY INJUNCTION SHOULD BE REVERSED IN ALL RESPECTS.

Dated: Brooklyn, New York
March 22, 1976

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